Supreme Court, U.S.
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No. 07-273

In The

# Supreme Court of the United States

NANCY SPIEGLA,

*Petitioner,*

v.

MAJOR EDDIE HULL, Individually And As An Employee Of The Westville Correctional Facility; HERB NEWKIRK, Individually As Superintendent Of Westville Correctional Facility; And BERNARD JOHNSON, Individually As An Employee Of Westville Correctional Facility

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

August 27, 2007

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## QUESTIONS PRESENTED

1. Is immediate review by this Court necessary to address the growing inter- and intra-Circuit conflict regarding the framework for evaluating the scope of a public employee's "official job responsibilities" when analyzing the citizen/employee distinction under the First Amendment, a question expressly reserved by this Court in *Garcetti v. Ceballos*, 126 S.Ct. 1951, 1961 (2006)?

2. Is it a question of fact for a jury to decide which job duties a public employee is actually expected to perform, as suggested in *Garcetti*, 126 S.Ct. at 1961-62; and if so, is immediate review by this Court necessary to correct the contrary position adopted by the Courts of Appeals on this important federal question?

3. Have the Circuit Courts wrongfully interpreted this Court's jurisprudence laid down in *Garcetti* in a way which conflicts with the First Amendment guarantee of a citizen's right to petition the Government for a redress of grievances?

## LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list represents all of the parties before the United States Court of Appeals for the Seventh Circuit:

The Petitioner is Nancy Spiegla, a Correctional Officer of the Westville Correctional Facility of the Indiana Department of Correction, who was the appellee below. The Respondents are Major Eddie Hull, former Superintendent Herb Newkirk, and former Assistant Superintendent Bernard Johnson, who were the appellants below.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petition of *Spiegla v. Hull* presents the Court with the opportunity to resolve unintended ambiguities, as well as put to rest one of the unintended consequences, resulting from *Garcetti v. Ceballos* – and to correct the unambiguous discomfort, frustration, and illogic that has penetrated subsequent rulings at both appellate and district levels. Unguided application of *Garcetti*, in which this Court withheld from formulating several doctrinal frameworks, has provoked overreaching consequences – ones that have provoked and will continue to provoke inconsistent rulings, confusion, and a diminishing of our guaranteed speech rights that function as no less than a primary principle of Constitutional law.

The Petitioner, Nancy Spiegla, respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, which occurred after re-briefing in light of this Court's decision in *Garcetti v. Ceballos,* with petition for rehearing *en banc* denied by the Court of Appeals on May 27, 2007.

## OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals is reported at 481 F.3d 961 (7th Cir. 2007) and is reprinted in the appendix hereto, at page App. 1, *infra*.

The earlier opinion of the Seventh Circuit Court of Appeals finding as a matter of law that this was protected

speech is reported at 371 F.3d 928 (7th Cir. 2004) and is reprinted in the appendix hereto, at page App. 16, *infra*.

## JURISDICTION

The panel decision of the Seventh Circuit Court of Appeals was entered on March 30, 2007. The decision of the Court of Appeals denying Petitioner's petition for rehearing *en banc* was entered on May 27, 2007.

The petition is filed within 90 days of the entry of judgment pursuant to U.S. Supreme Court Rule 13.1. This Court has jurisdiction to review the judgment of the Seventh Circuit under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this case are as follows:

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity,

> injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable . . .

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . ; or the right of the people . . . to petition the Government for a redress of grievances.

## STATEMENT OF THE CASE

### Background.

Nancy Spiegla has been a Correctional Officer at the Westville Correctional Facility ('WCF') since 1985. She was an exemplary employee who enjoyed the respect of her co-workers as well as the inmates because of her competency, her professionalism, and her integrity. She struggled to support her family, and by all accounts, including her own, she loved her job. She remains employed by WCF to this day, albeit in a different position.

Spiegla earned the commendation of Correctional Officer of the Year for the year 1999, the year immediately preceding her involuntary and retaliatory transfer. Spiegla was selected to be included on a billboard advertising jobs within the Indiana Department of Correction around the time of her commendation as Officer of the Year. She won her First Amendment retaliation case by jury verdict in 2005 after being retaliated against for pointing out concerns regarding an unexplainable local policy shift unsanctioned by the state, and a concurrent security concern. The subsequent reversal by the Seventh Circuit Court of

Appeals was based solely on an inaccurate reading of this Court's holding in *Garcetti v. Ceballos*.

## Spiegla Was Never Disciplined for Her Speech; Defendants Offered Other Reasons For Her Involuntary Transfer, Later Found by A Jury to be Pretext.

This case, unlike many others considered by lower courts, has never involved any suggestion that Spiegla's speech was subject to or warranted discipline. Rather, Defendants below argued that a long-planned organizational change was the reason for Spiegla's transfer. Spiegla presented testimony and evidence showing otherwise. Defendants presented their arguments to the jury, who found that the alleged reason for transfer was pretext for unconstitutional retaliation.

## Contraband Entering State Prisons and Related Prison Policies Are the Public Concerns at Issue.

Contraband coming into prisons is a serious problem across the country and in Indiana. Newkirk, former Superintendent of Westville Correctional Facility ('WCF') and Spiegla's former superior, indicated at trial that contraband is a concern of every officer at his prison. Facts at trial demonstrated that most contraband enters WCF through staff. Contraband coming into the prison was a serious problem that occurred daily. Employees and officers of WCF were caught on various occasions bringing in contraband through the search area at the main gate. Officers and staff had been fired and disciplined for trafficking in contraband. The State of Indiana strictly prohibits trafficking in contraband with inmates, and such

trafficking can result in the imposition of a felony criminal offense (*see* Indiana Code § 35-44-3-9). There are special fines and punishments for trafficking by employees of the Department of Correction (*see* Indiana Code § 35-44-3-9(c)).

**Local Change in Search Policy Contradicts Official State Policy.**

In order to combat the contraband problem, WCF, like all state prison facilities, had a policy in place which provided that *all* individuals were subject to search when entering the facility through the main gate. Spiegla followed this practice and policy during her years working as a guard at the front gate; her exemplary performance of that duty is not at issue in this petition. However, when Newkirk became the superintendent at WCF, he modified the search policy to exempt state vehicles, and likewise the individuals within those state vehicles, from search. That new exemption underlies the important public concern that gave rise to Ms. Spiegla's ultimate First Amendment claim.

Prior to Newkirk's tenure, the policy in place did not permit employees and officers of the WCF to leave the facility and then return to the prison facility without being searched. The purpose of this policy was to prevent employees from exiting the facility and returning with contraband. Newkirk's policy, as established at trial, was in conflict with the administrative policy for the DOC established by the state's central policy-making body. Indeed, the Public Affairs Officer for the Indiana Department of Correction confirmed this. No one from WCF had ever contacted the central office to gain prior approval or to get

any sort of response or input from the Commissioner of the DOC with respect to this policy. Trial testimony indicated that even the Commissioner of the DOC should not have been exempted from search at the front gate of a state prison facility.

### Spiegla Observes Suspicious Conduct of Ranking Officers.

On January 6, 2000, Spiegla was working the front gate at WCF. Spiegla saw Defendant Hull and a companion exit the WCF main gate in a state vehicle and drive to their personal vehicles, which were parked in the adjacent parking lot. The officers stopped at a truck in the parking lot and retrieved a bag from the private vehicle. The bag was placed in the state vehicle and the officers drove up to Hull's car, also in the parking lot. Spiegla observed Hull retrieve something else and put it in the state vehicle. The two officers then drove towards the main gate where Spiegla was working. Spiegla opened the first gate and began closing the second back gate in order to initiate a search of the vehicle. At that point, Spiegla's immediate supervisor asked Spiegla what she was doing. Spiegla informed him that she was attempting to search the vehicle. The supervisor told Spiegla such searches were not to be done anymore pursuant to new policy. Spiegla complied and did not search the vehicle.

### Retaliation by Defendants for First Amendment Speech.

Spiegla had concerns with the new policy and discussed it with her immediate supervisor. Spiegla was concerned with this change in policy because it was

inconsistent with the common-sense understanding that all vehicles *should* be searched for contraband – although this was not the new policy – and because she wanted to personally search to make sure that there was nothing in the form of contraband inside the bags the officers were bringing in.

Then bypassing her immediate superior, Spiegla described the situation and her concerns to the Assistant Superintendent of WCF, John Schrader, who was neither her immediate supervisor nor in the proper chain of command for Spiegla. Schrader told Spiegla that he agreed with her concerns and that she should have searched the vehicle and that there was no exception. Schrader indicated that he was unaware of any new exemption. Schrader told Spiegla that he was going to take her concerns up with the superintendent of the facility, Newkirk, in a prompt manner. Schrader spoke directly with Newkirk shortly thereafter about what Spiegla had reported. According to Schrader, Newkirk said that he would handle the issue personally.

Newkirk recalled discussing with Schrader the concern that Spiegla had voiced, specifically, the concern over the fact that officers were going to the parking lot in state vehicles and re-entering the institution without being searched. Newkirk brought up the issue at a meeting of WCF superior officers. Present at that meeting was Defendant Bernard Johnson. After learning of Spiegla's concern, Johnson indicated that he was "pissed off." Johnson discussed Spiegla's complaint with Defendant Hull. Hull would later suggest at trial that the situation must have arisen when he went to his car to get a gym bag; but his credibility with the jury was destroyed when

he was impeached with prior deposition testimony that he *never* went to his private vehicle to retrieve gym clothes.

After Spiegla made her complaint to Schrader, he addressed the issue with Newkirk the following day, on a Friday. Spiegla worked that Friday and had Saturday and Sunday off. The following week, Spiegla returned to work and was notified that she was to be transferred away from the front gate. All three defendants – Hull, Newkirk and Johnson – had the ability to transfer and reassign Nancy Spiegla. Johnson testified that he took the responsibility for giving Hull the direction to make the transfer, and that Major Hull had the authority to make the transfer. Johnson stated, "All three of us had the power to transfer Nancy Spiegla." Hull indicated that he was part of the decision to transfer Nancy Spiegla and that he had the authority to transfer Spiegla from her front gate position.

Spiegla filed a grievance as a result of the transfer. As part of the grievance procedure, Spiegla met with Johnson. Her union steward accompanied Spiegla. The steward questioned Johnson regarding the grievance and Johnson jumped up and shook his finger at her and told her "Don't tell me how to do my job." The steward inquired "I want to know, why did you pull your most reliable officer off this post?" Johnson said "I can do whatever I want. Furthermore, the Superintendent did what he wanted." Spiegla's grievance was denied, and at trial, Johnson stated he denied the grievance and added, "We had other plans for Spiegla." His angry tone was clear to the jury and to the court.

**Procedural Posture of the Case and Jurisdiction.**

Ms. Spiegla initiated her lawsuit in the Northern District of Indiana on December 26, 2001, by filing a Complaint against the three named Defendants, now respondents to this petition. Ms. Spiegla sought actual damages and punitive damages for the violation of her Constitutional rights under the First Amendment. The District Court, Judge Alan J. Sharp presiding, initially ruled against Spiegla, granting summary judgment in Defendants'/Respondents' favor; Ms. Spiegla appealed. The Seventh Circuit issued a 2004 decision reversing Judge Sharp and finding as a matter of law that Nancy Spiegla spoke not as an employee but as a citizen about matters of public policy and public concern, and the case was remanded to the district court for further findings consistent with the *Connick-Pickering* balancing requirement. The District Court subsequently denied Defendants' second motion for summary judgment, and the matter proceeded to trial. A properly instructed jury found that Spiegla's removal from her post was retaliation by Defendants for her First Amendment speech, and the jury awarded her $210,000.00. The matter was appealed by the Defendants in 2005 and fully briefed. Subsequently, the case of *Garcetti v. Ceballos* was handed down in 2006 and the Chief Judge ordered re-briefing in light of *Garcetti*. At oral argument, the Court of Appeals panel inquired only as to the effect of *Garcetti*, ignoring all other issues raised by Defendants in their primary appeal. The panel ultimately overturned the jury verdict based on an inaccurate and unconstitutional application of this Court's holding in *Garcetti*.

The jurisdiction of the district court was invoked pursuant to the provisions of 28 U.S.C. §§ 1331 and

1343(3) and (4), this being a suit authorized by 42 U.S.C. § 1983 to redress the deprivation of rights, privileges, and immunities secured by the First and Fourteenth Amendments to the Constitution of the United States. The Seventh Circuit Court of Appeals maintained jurisdiction to review the judgment based on the Defendants'/Respondents' appeal from a final judgment under 28 U.S.C. § 1291.

## REASONS FOR GRANTING THE WRIT

### The Underpinnings of First Amendment Constitutional Protections Remain Applicable to Every American Citizen.

Speech that is not compelled is speech uttered by a citizen. The concept of *vox populi* – or 'voice of the people' – has distinguished the broad constitutional protections that underpin all rights articulated in the U.S. Constitution, and echoes uncompromised throughout every aspect thereof; the protections afforded the speech rights of a democratic citizenry are the most admired in the world, and the most feared in societies with anti-democratic governance.

The right of redress is but one of the fundamental aspects of First Amendment speech, but nevertheless one that is embodied in electoral practice, the jury system, remonstrance, referendum, legislation, judicial proceedings, even to the extent of creating 'whistle blowing' statutes to insure that citizens may, in fact, notify the citizenry of their government's inner workings. In *Hull v. Spiegla*, 481 F.3d 961 (7th Cir. 2007), those protections have been overturned. Government functions best when citizens – whether acting

privately or in an employment capacity – are responsibly and constructively able to question or expose abuses of governmental or civil authority.

The Seventh Circuit in this case issued an opinion which directly conflicts with this Court's *Garcetti* analysis by broadening the definition of "official job duties" so widely that if that decision is allowed to stand, public employees will lose even those rights expressly re-affirmed by this Court, without conceivable limit. Under the guise of following this Court's recent pronouncements regarding the First Amendment, the Courts of Appeals have acted in a way to deny Petitioner Spiegla and the millions of other public employees all protections under the First Amendment following the Supreme Court's decision in *Garcetti v. Ceballos,* 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006). *See, e.g., Green v. Barrett*, 226 Fed.Appx. 883 (11th Cir. 2007) (holding *Garcetti* bars protection for guard who testified as to broken cell locks throughout jail used to house high-security prisoners); *Vila v. Padron*, 484 F.3d 1334 (11th Cir. 2007) (holding *Garcetti* bars protection for college vice president raising concerns about the legality of the college's actions). In a decision by a divided Court (5-4), the majority issued an opinion that favored employers' prerogatives to discipline employees over an employee who brings matters of public policy or public safety to the attention of supervisors. Yet trial courts and Courts of Appeal have ignored the explicit limits of *Garcetti*, wherein this Court rejected the notion that expressing opinions within the workplace alone cuts off First Amendment protections for public employees, *Garcetti* at 1959; and also rejected any argument that opinions expressed concerning the subject matter of a public employee's own job would foreclose First Amendment protections. *Id.*; *see Garcetti* at

1959 ("[I]t would not serve the goal of treating public employees like 'any member of the general public,' to hold that all speech within the office is automatically exposed to restriction.") (quoting *Pickering v. Bd. of Education*, 391 U.S. 563 at 573 (1968)); *see also Rankin v. McPherson*, 483 U.S. 378, 387 n.11 (1987) ("The private nature of the statement does not . . . vitiate the status of the statement as addressing a matter of public concern.").

Following the *Garcetti* decision, Spiegla's case was ordered re-briefed. A first panel decision, authored in 2004, had found Spiegla's utterances to be the speech of a citizen and not that of an employee; yet a subsequent panel, that of 2007, found that the speech was somehow no longer made as a citizen, but rather was part of Spiegla's general job duties as a correctional officer. This legal conclusion provided no analysis, and in fact ignored all testimony and all evidence that supported an opposite conclusion. Trial evidence and testimony support the finding that Ms. Spiegla's job did not entail raising policy concerns or questioning the Superintendent's new policy of exempting state vehicles from search and certain state employees from personal security search.

Both before and after *Garcetti*, First Amendment whistleblower cases remain vital to our democratic society. As the Supreme Court noted in *Garcetti*, "Exposing governmental inefficiency and misconduct is a matter of considerable significance." *Garcetti*, 126 S.Ct. at 1962. Indeed, "[w]ere [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." *Id.* at 1959 (quoting

*San Diego v. Roe*, 543 U.S. 77, 82 (2004) (*per curiam*)). In short, Supreme Court jurisprudence on First Amendment public retaliation cases "acknowledged the necessity for informed, vibrant dialogue in a democratic society" and that "widespread costs may arise when dialogue is repressed." *Garcetti*, 126 S.Ct. at 1959.

## The Decision of the Court of Appeals Must Be Reversed Because It Ignores *Garcetti* By Making Judicial Determinations of "Official Job Responsibilities," Rather Than Properly Treating The Issue as a Question of Fact.

In *Spiegla v. Hull*, 371 F.3d 928 (7th Cir. 2004) ("*Spiegla I*"), an appellate panel unanimously found that Ms. Spiegla's speech was that of a citizen and *outside* of her core job responsibilities. *Spiegla I* at 939. Three years later, a second appellate panel unanimously found that her speech was *part* of her job responsibilities. *Hull v. Spiegla*, 481 F.3d 961 (7th Cir. 2007) ("*Spiegla II*"). This points out, if nothing else, how fact-sensitive the job duties-determination is, and how inappropriate it is for courts to make the determination a legal question and not a factual question. This invites arbitrariness and judicial oversight of non-judicial government bodies. Some District Courts, for instance, have pointed out that the determination of "actual" job responsibilities is clearly a fact-sensitive question. For example, Judge McKinney of the Southern District of Indiana found post-*Garcetti* that the speech of a government employee could not be disposed of through summary judgment while the parties disputed material facts underlying the actual job responsibilities. *Kodrea v. City of Kokomo, Ind.*, 458 F.Supp.2d 857, 867-68 (S.D. Ind. 2006); *accord Maras-Roberts v. Phillippe*, 2007 WL

1239119 at *5 (S.D. Ind. 2007) (unpublished). ("[W]hat tasks comprise [plaintiff]' job duties remains a question of fact."), citing *Kodrea, supra.* Yet despite a minority of District Courts following this view, the majority of the Courts of Appeals are simply making determinations of "job responsibilities" as a matter of law; one need look no further than the present case, where the Seventh Circuit overturned a post-trial jury verdict without once discussing any trial record regarding what Ms. Spiegla's job duties actually entailed. *See also Hill v. Borough of Kutztown*, 455 F.3d 225 (2006) (making employee/citizen distinctions on motion to dismiss, no factual discovery); *Ibarra v. Lexington-Fayette Urban County Government*, 2007 WL 579670 (6th Cir. Feb. 23, 2007) (slip copy) (dismissing complaint on motion to dismiss, no factual discovery); *Cf. Hayes v. Board of Educ. of Chester Union Free City School*, 211 Fed.Appx. 28 (2nd Cir. 2007) (remanding case to district court for parties to develop the record respecting scope of former employee's job duties); *Paola v. Spada*, 204 Fed.Appx. 946 (2nd Cir. 2006) (same).

The troubling difference between the 2004 *Spiegla I* and 2007 *Spiegla II* panel decisions is that the *Spiegla II* panel simply abandoned any attempt to factually evaluate just what Spiegla's job actually entailed. The 2004 *Spiegla I* decision dedicated some sixteen pages to an evaluation of the case; in 2007, the *Spiegla II* panel dedicates only six. In fact, the *Spiegla I* decision, issued years *prior* to *Garcetti*, far more extensively examined the "official job duties" question. For example, the *Spiegla I* panel noted:

> The Defendants contend that a failure to communicate her concerns would have been a dereliction of Spiegla's duty (a surprising position considering that the Defendants also argue that

> the speech in question was nothing more than an informational inquiry). As we said of a similar argument raised in *Delgado*[1], "this argument . . . sweeps much too broadly." *Id.* While Spiegla's actions may have been consistent with her general duty as a correctional officer to keep the facility secure, they were not part and parcel of her core functions.

*Spiegla I* at 939.

In contrast, the *Spiegla II* panel evasively responds only with, "This focus on 'core' job functions is too narrow after *Garcetti* . . . ," *Spiegla II* at 10. An explanation is not to be had, but an analysis of the two *Spiegla* cases to *Garcetti* makes clear that the differences are too great to withstand scrutiny, and the apparent reasoning will work great damage to the many First Amendment protections that remain.

The Court of Appeals' refusal to factually evaluate "official job duties" is all the more confusing because even *prior* to *Garcetti*, numerous Courts *already* exempted speech made pursuant to official job duties from First Amendment protections. The Seventh Circuit Court of Appeals involved here was one such court.[2] For Spiegla to

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[1] Referring to *Delgado v. Jones*, 282 F.3d 511 (7th Cir. 2002).

[2] *See Gonzalez v. City of Chicago*, 239 F.3d 939 (7th Cir. 2001) (civilian employee of police department not speaking as a citizen when speech was made in required report and through required opinions); *see also Youker v. Schoenenberger*, 22 F.3d 163 (7th Cir. 1994) (plaintiff's speech was "part of his [job] responsibilities" and plaintiff did not speak "'as a citizen' on a matter of public concern."); *Koch v. City of Hutchinson*, 847 F.2d 1436 (10th Cir. 1988), *cert. denied*, 488 U.S. 909 (1988) (routine report of fire marshal regarding cause of a fire did not address a matter of public concern); *Cahill v. O'Donnell*, 75 F.Supp.2d 264 (S.D.N.Y. 1999)

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have survived the "official job duties" question under prior circuit case law, only to succumb to the same question under *Garcetti,* suggests that some other factor is at play. It appears, however, that lower courts are not viewing "official job duties" as fact-sensitive, and instead are overstepping the bounds of *Garcetti* by defining such duties as a matter of law. *See, e.g., Mills v. City of Evansville*, 452 F.3d 646 (7th Cir. 2006) (holding police sergeant not speaking as a citizen when she said chief's plan would not work and expressed intent to enlist community organizations against the plan, Seventh Circuit considers dispositive that plaintiff was "on duty, in uniform, and in discussion with her superiors," *Mills* at 648, all of which are *not* dispositive as explicitly noted in *Garcetti*; almost no other facts considered); *Wilburn v. Robinson*, 480 F.3d 1140 (D.C. Cir. 2007) (holding interim director of D.C. Office of Human Rights not speaking as a citizen when she asserted that office salary differentiation between outside and inside job applicants was unconstitutional; in a single paragraph Court of Appeals looks only to four facts and makes a decision of law); *Cf. Lindsey v. City of Orrick, Missouri*, ___ F.3d ___, 2007 WL 181493 (8th Cir. June 26, 2007) (slip copy) (holding that even where speech of public employee was made at meeting with required attendance, closer evaluation of the facts showed the speech was not a part of employee's expected job duties).

In practice, this Court should have no desire to abandon a fact-sensitive inquiry. To hold otherwise is to not only invite, but to mandate that courts define *as a matter of law* the specific job duties of every class and sub-class of

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(speech by police department Internal Affairs employees made in course of "day-to-day professional obligations" not protected).

public employee who brings her complaint to the courthouse steps. This is untenable. Only a specific inquiry into the facts of each case makes sense under the assumptions of *Garcetti*.

### Citizen Speech by Public Employees Commonly Has Multiple Components; This Court Should Require That Each Component Be Addressed Separately.

If Spiegla had simply acted pursuant to her official job duties and followed the new policies, she would have remained silent. There are two very marked differences between the *Spiegla I* and *Spiegla II* panel decisions. The first is that the 2004 *Spiegla I* panel viewed Spiegla's suspicions of a particular security breach as inextricably intertwined with her complaint about the new WCF search policy. *Spiegla I* at 935 and 937 ("The speech at issue in this case consists of Spiegla's statements to Assistant Superintendent Shrader regarding (1) the state-owned vehicle search exemption policy and (2) the behavior of Hull and Huff."; "[W]hen Spiegla's questions about the policy are considered in conjunction with her allegations of malfeasance, it becomes apparent that, in substance, she spoke on a matter of public concern."). However, the 2007 *Spiegla II* panel abruptly severed Spiegla's complaints about the new search policy entirely, instead discussing only Spiegla's observations of the possible malfeasance *without* considering her complaints about the new policy. *Spiegla II* at 2 and 9-10 ("The speech at issue here is a complaint Spiegla made about having been prevented by her immediate supervisor from investigating a possible security breach . . . "; "Spiegla recounted the incident to Schrader pursuant to her responsibility as

a correctional officer to inform her superiors of a possible breach in prison search policy.")

Post-*Garcetti*, the 2007 *Spiegla II* panel's assertion that Petitioner Spiegla was only "inform[ing] her superiors of a possible breach in prison search policy," *supra*, is particularly troubling, as *this is exactly the opposite of what Nancy Spiegla did*. She informed a superior officer that a newly promulgated but *existing* policy (already in effect) *created* the potential for breaches in security.

The *Garcetti* majority noted that in determining job duties, "[t]he proper inquiry is a practical one." *Garcetti*, 126 S.Ct. at 1961. Yet *Garcetti* made no attempt to outline a framework for determining just how courts are to determine what those responsibilities are. Rather than fashioning frameworks, the Courts of Appeals, as in this case, are simply making *ad hoc* determinations of law, captioning official job duties as anything that even *involves* work. That was not the *Garcetti* holding; it was the *duty* to speak, not the *content* of that speech, which determined the applicability of the employee/citizen distinction. Here, the Seventh Circuit made no attempt to make that delineation. Nancy Spiegla was not required to make her speech, and in fact was urged not to make her policy concerns an issue by her immediate supervisor, and *Garcetti* should not pose a bar to her claim. Spiegla spoke as a citizen when she spoke to Assistant Superintendent Shrader.

Unlike Ceballos, the Deputy Prosecutor who complained about a specific directive involving a particular case, Ms. Spiegla was complaining about a localized policy change that was contrary to common sense, good correctional security standards, and even to the existing policies

of the Department of Correction for the entire state. Ms. Spiegla carefully considered her options and chose the least disruptive method by informing a high-ranking administrator of her policy concerns along with specific observations of suspicious conduct (which suggested that contraband was being brought into the prison because of this new policy of exempting state vehicles from search).

Ms. Spiegla was and is not a whistleblower; she obeyed her immediate supervisor who instructed her not to conduct the previously standard search, yet she risked the discipline of that immediate supervisor by discretely bringing the matter to the attention of the Assistant Superintendent Schrader, who was not in her chain of command.

As an analogy, there are a number of cases in which a teacher speaks to a school board, to the highest-ranking office, or to the body of the school corporation, where such speech has frequently been found to be protected speech. It should be noted that usually the speaker identifies herself as a teacher, the speech usually occurs on school property where the board meeting is held, and the policy question may be framed in the context of specific evidence or facts or the experience of that teacher. The context does not disqualify the speech because the main issue is a policy issue, which is protected as First Amendment speech if it is a matter of public concern. *See, e.g., Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976).

As is generally the case, government employees are restricted in their ability to speak to the media or to speak

critically about any government practices or policies until first availing themselves of any internal processes. Such publication outside of a governmental agency or department could easily be characterized as disruptive placing that government agency in an unfavorable light. Under the *Connick-Pickering* test, that employee then would suffer the exclusion of First Amendment protection irrespective of her motives.

This Court should overturn the Court of Appeals here because the conflating of Petitioner's speech – first, a concern about an unjustified policy shift and second, a concurrent security concern personally observed – does not follow the implied *Garcetti* mandates. In making employee/citizen speech distinction, courts must evaluate each component of the speech, rather than striking protection for speech if it touches on job responsibilities in any manner at all. The Court of Appeals should be reversed.

## No Whistleblower Statute Protects Petitioner Here.

No party to this case suggests that Petitioner Spiegla had or has any alternative state protection under a whistleblowing statute or the like. Like countless millions throughout the country, if this Court allows the Courts of Appeals' interpretations of *Garcetti* to stand, public employees will have no protections and serious disincentives in discussing irrational public policy or intentional malfeasance.

*Garcetti* suggests that the states have adequate whistleblower statutes as an alternative procedural remedy for civil action and relief if damages are appropriate. As *Garcetti*'s dissenting justices point out, and as is

true specifically in Indiana and many other states, there is no whistleblower statute that protects government employees such as Spiegla. *Garcetti*, 1216 S.Ct. at 1971, n.8-11. There is no justifiable reason to think of the First Amendment as an alternative, secondary remedy to protect an individual's right of free speech. "The applicability of a provision of the Constitution has never depended on the vagaries of state or federal law," *Board of Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 680, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996). The United States Constitution and its Amendments were intended as a superceding, overarching protection to all citizens' rights irrespective of state law or state practices and policies, which would otherwise limit or restrict individual freedoms.

The opportunity for Nancy Spiegla, or for any other of the millions of government employees, to find protection under the several provisions of the First Amendment is in jeopardy. The final provision of the First Amendment mandates that citizens have a right to petition the Government for redress of grievances. Utilizing *Garcetti* but ignoring its limits, the Courts of Appeals have eviscerated the First Amendment protection of free speech for citizens who work for government and who have the temerity to question a practice or policy which appears to be unethical, illegal, or criminal. The unbridled expansion of *Garcetti* serves no policy goal of either government or the public, and instead threatens both.

The majority opinion in *Garcetti* placed great emphasis on the employer's authority and prerogative to discipline individuals, regardless of whether the allegations of misconduct were correct or incorrect. The opinion emphasized the concern that employees could have an extraordinary shield insulating otherwise justifiable disciplinary action

except for their assertion of First Amendment speech privileges. This characterization and concern, while justified, is no different than any other pre-textual argument that a Plaintiff must overcome under any Federal statute that is analyzed under the *McDonnell Douglas*[3] framework, which protects him from discrimination, unlawful harassment, or other unlawful conduct.

Neither Garcetti nor the Amicus for that petitioner offered any statistical or empirical evidence to demonstrate that pre-*Garcetti* government employers were under any extraordinary difficulty in disciplining the workforce. However, the post-*Garcetti* landscape reveals that employees who speak on matters of public concern or public policy will have their claims dismissed as a matter of law based on a *legal* finding that the speech is part of the employee's job. Furthermore, District Courts have apologetically followed *Garcetti* despite the appellate trend of broadening its scope beyond this Court's intended parameters: "This court is gravely troubled by the effect of *Garcetti* upon a factual scenario such as that before the bar . . . [where] [t]he Mississippi whistleblower statute does not appear to protect whistleblowing to a government employer's supervisor . . . Despite this unfortunate reality, this court remains bound by U.S. Supreme Court precedent," *Williams v. Riley*, 481 F.Supp.2d 582, 584-85 (N.D. Miss. 2007); "This court has no choice but to follow the mandate of the Court of Appeals, but does so very reluctantly. Therefore, it is ORDERED that the money judgment in favor of the plaintiff is VACATED . . . " *Order* of March 30, 2007, *Spiegla v. Hull, et al.*, Cause No. 4:01cv0075 (N.D. Ind. 2007). Even a panel of the Seventh Circuit has questioned *Garcetti*'s result: "We recognize the oddity of a

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[3] *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

constitutional ruling in which speech said to one individual may be protected under the First Amendment, while precisely the same speech said to another individual is not protected . . . Despite [this], *Garcetti* established just such a framework, and we are obliged to follow it." *Morales v. Jones*, ___ F.3d ___, 2007 WL 2033754 at *7 (7th Cir. July 17, 2007) (slip copy).

## This Court Cannot Allow Government Employers to Cut Off First Amendment Protections by Drafting Job Duties to Include the General Duty to Report Malfeasance; Yet This is the Holding from the Seventh Circuit in *Spiegla II*.

In a free society citizens expect transparency of government operations. *Garcetti*, as it is currently being interpreted by the Courts of Appeals and as it was interpreted here, practically forces employees to ignore unlawful practices unless those practices are *specifically* outside of their job description – a consequence of *Garcetti*'s failure to provide a framework for evaluating the extent of official job responsibilities. Yet perversely, in such instances employees also face discipline for failing to report any unlawful, unethical, or criminal conduct.

Three district courts – and *only* three, from Petitioner's research – have noted that a job requirement to report all violations of every rule would violate *Garcetti*'s rejection of excessively-broad job descriptions; *see Drolett v. DeMarco*, 2007 WL 1851102, *6 (D.Conn. June 26, 2007) (slip copy); *Barclay v. Michalsky*, 451 F.Supp.2d 386, 395-96 (D.Conn. 2006); *Batt v. City of Oakland*, 2006 WL 1980401 (N.D. Cal. 2006) (unpublished); *Jackson v. Jimino*, 2007 WL 1160409 (N.D.N.Y. April 17, 2007) (slip copy). Yet no Court of Appeals has rejected this overbroad

reading of *Garcetti*. Indeed, the Seventh Circuit Court of Appeals in *this* case has embraced the concept in its broadest possible definition: "Spiegla recounted the incident to Schrader pursuant to her responsibility as a correctional officer to inform her superiors of a possible breach in prison search policy, especially one involving two senior prison officers." *Spiegla II*, 481 F.3d at 966. The Seventh Circuit panel made this statement without citation, and it was without support from the trial record. It also appears that public employers are likely to embrace this trend. *See* American Bar Association "Hot Topic" publication, Section of Labor and Employment Law: "What follows are some practice tips for lawyers following *Garcetti*: For management counsel: 1. Where appropriate, counsel clients to include in job descriptions the employee's duties . . . to report misconduct or violations of policy or procedure."[4] Yet it is improbable to expect the heroic sacrifice of an individual's job without First Amendment protection.

Fear of retaliation without redress breeds contempt of government and causes an erosion of institutional respect. Hopefully it can be asked, and it was anticipated in the majority decision, what if a high school teacher wishes to tactfully question a school policy on curriculum content? Are spoken or written concerns presented to a school board outside of the organizational chain of authority subject to retaliation without recourse under the First Amendment? *See, e.g., Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979). Would the teacher's personal experience

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[4] Found at http://www.abanet.org/abanet/common/print/newprintreview.cfm?ref=htttp://www.abanet.org/labor/hot_topic_garcetti.html, accessed on Aug. 15, 2007.

and expertise be viewed under *Garcetti* as a justification for labeling the speech personal and not that of a citizen? All of these scenarios are fact sensitive and not amenable to easy disposition by a lone judge, when the material facts underlying *actual* "official job responsibilities" are in dispute. Unlike the situation in *Garcetti*, Nancy Spiegla was reporting to a high-ranking official (outside her chain of command) a questionable new policy that defied common sense in all correctional/security protocols and standards. Her individual experience and employment history gave credence to bringing this matter of public safety to the attention of a proper authority. She was reporting a policy in the context of her observations of suspicious conduct, which any reasonable correctional officer would view as suspicious; yet she was the only one that had the courage to speak out. Seven years later she is unsure if it was worth the trouble, as are the millions of government employees in the United States of America; if this Court declines to stay the advance of the Courts of Appeals' interpretation of *Garcetti*, those millions will have simply lost the First Amendment protections that other citizens enjoy.

## CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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**In the**
**United States Court of Appeals**
**for the Seventh Circuit**

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No. 05-3722

NANCY SPIEGLA,

*Plaintiff-Appellee,*

*v.*

EDWARD HULL, Individually and
as an employee of Westville Correctional Facility,
HERBERT NEWKIRK, Individually and as
Superintendent of Westville correctional Facility,
and BERNARD JOHNSON, Individually and as
an Employee of Westville Correctional Facility,

*Defendants-Appellants.*

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Appeal from the United States District Court
for the Northern District of Indiana,
Hammond Division at Lafayette.
No. 01 CV 0075 – **Allen Sharp**, *Judge*.

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ARGUED SEPTEMBER 12, 2006 – DECIDED MARCH 30, 2007

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Before EASTERBROOK, *Chief Judge*, and POSNER and SYKES, *Circuit Judges*.

SYKES, *Circuit Judge*. This First Amendment retaliation case is before us for the second time. In the first appeal, we held that Indiana State Correctional Officer Nancy Spiegla engaged in protected speech by reporting a

possible security lapse to an assistant superintendent at the Westville Correctional Facility where she worked. On remand, a jury found that the defendants – Westville's superintendent, assistant superintendent, and a senior corrections officer – retaliated against her on the basis of this protected speech and awarded her $210,000 in damages. The defendants appealed, and after briefing was completed, the Supreme Court decided *Garcetti v. Ceballos,* 126 S. Ct. 1951, 1960 (2006), holding that the First Amendment does not protect statements made pursuant to a public employee's official duties because that employee is not speaking as a "citizen" but as an employee. Because our first holding addressed the degree of First Amendment protection afforded public employees under then-existing case law, we must now reexamine its soundness in light of *Garcetti.*

The speech at issue here is a complaint Spiegla made about having been prevented by her immediate supervisor from investigating a possible security breach while she was on duty and stationed at the prison's main gate. Spiegla noted the incident in her log and later that same day reported it to an assistant superintendent. In bringing the possible security lapse to his attention, Spiegla was speaking not as a citizen but as a correctional officer charged with the duty to ensure the prison's safety and security. Accordingly, the First Amendment does not insulate her statements from employer discipline, and the judgment in her favor must be vacated.

## I. Background

From 1985 to 2000, Nancy Spiegla was employed as a state correctional officer at the Westville Correctional

Facility in Indiana. From 1993 to 2000, Spiegla worked essentially the same post at the prison's main gate on a 5-2 schedule (five days on, two off). Working the main gate involved controlling the traffic in and out of the prison, as well as searching the vehicles of visitors and employees for contraband. By all accounts Spiegla was an outstanding employee throughout her tenure at the prison.

On January 13, 2000, Spiegla was at her main-gate post alongside Sergeant Brian Moody, her immediate supervisor, when something in the parking lot caught her attention. She saw Major Eddie Hull and Captain Ernest Huff transfer bags from their private vehicles into the state-owned truck they were driving. When the two men approached the main gate in the truck, Spiegla intended to search their bags for possible contraband as part of the general search she performed on all vehicles entering the prison.[1] But when she got up to leave the guard house, Moody dissuaded her from searching the truck, explaining that a recent change in prison policy exempted all state vehicles from search. Spiegla had not heard of any change and believed the correct policy was to search all vehicles, no exceptions. Frustrated that she "could not go out there and do [her] job," Spiegla noted the apparent breach of prison policy in her log.

Later that day, Spiegla recounted the incident to Assistant Superintendent John Schrader, who told her she should have searched Hull and Huff's truck. Schrader also promised to refer the matter to Superintendent Herbert Newkirk, which he did at an executive staff meeting later

[1] There is no indication Hull or Huff were actually engaged in smuggling contraband.

that day or the next. At the meeting Newkirk asked Assistant Superintendent Bernard Johnson (who was angry at the manner in which Spiegla's concerns were raised) to investigate the matter.

Four days later Spiegla was reassigned from the main gate to the perimeter, a 6-2 shift that involved walking around the prison's outer fence and delivering food to the towers. Upset over the transfer, Spiegla brought this action under 42 U.S.C. § 1983 against Johnson, Hull, and Newkirk, all of whom had authority to transfer her. She claimed she was transferred in retaliation for reporting the main gate incident to Schrader; these statements, she asserted, were protected speech under the First Amendment. The district court granted summary judgment for the defendants on the ground that Spiegla "was not speaking out as a citizen, but rather as an employee" and therefore had not engaged in protected speech.

On appeal we reversed and remanded, holding in part that the First Amendment did protect her statements to Schrader. *Spiegla v. Hull,* 371 F.3d 928, 939 (7th Cir. 2004) ("*Spiegla I*") (concluding that Spiegla "spoke as a private citizen on a matter of public concern"). The case ultimately went to trial on the remaining issues of fact – namely, causation and whether the defendants would have taken the same action in the absence of the protected speech. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). The jury found for Spiegla and awarded her $210,000 in damages.

The defendants appealed, asserting a number of trial errors. But after briefing was completed, the Supreme Court issued its decision in *Garcetti,* clarifying the threshold legal inquiry in First Amendment retaliation claims in

the public employment context. The defendants requested a supplemental briefing schedule in light of *Garcetti*. We granted their request and ordered the parties to submit supplemental memoranda discussing the effect of *Garcetti* on this appeal.

## II. Analysis

Our first inquiry is the application of *Garcetti* to Spiegla's claim; if Spiegla was not speaking as a "citizen" as understood in *Garcetti,* her speech was not protected by the First Amendment as a matter of law and we need not reach the trial errors asserted by the defendants. *Garcetti* made it clear that public employees have no cause of action for First Amendment retaliation unless they were disciplined for speaking *as citizens* about a matter of public concern. 126 S. Ct. at 1958, 1960. When public employees make statements pursuant to their official duties, they are not speaking as citizens and "the Constitution does not insulate their communications from employer discipline." *Id.* at 1960. In other words, if Spiegla's statements to Schrader were made pursuant to her official duties as a correctional officer, it was not protected speech and she has no claim for First Amendment retaliation.

### A. Procedural Arguments

Before turning to the impact of *Garcetti* on Spiegla's claim, we must first address her contention that the defendants' "efforts to use [*Garcetti*] to overturn the . . . verdicts" are procedurally defective. More specifically, Spiegla asserts (1) the defendants waived their *Garcetti* argument by failing to raise it in the district court or in

their initial appellate briefs; and (2) the defendants' "motion to discuss supplemental authority [was] an improper method" of raising *Garcetti*. She is wrong on both counts.

Arguments not raised in the district court are generally waived on appeal, *Belom v. Nat'l Future Ass'n*, 284 F.3d 795, 799 (7th Cir. 2002), but here the defendants did make a *Garcetti*-type argument before the district court. Most significantly, they moved for summary judgment on the basis that "speech required in the course of public employment is not protected by the First Amendment." This argument anticipated the ultimate holding in *Garcetti*, and moving for summary judgment on this ground was sufficient to preserve the issue for appellate review. *See Pond v. Michelin N. Am., Inc.*, 183 F.3d 592, 597 (7th Cir. 1999).

The defendants' failure to raise a *Garcetti*-type argument on remand or in their initial appellate briefs in this second round of appellate proceedings was understandable. We had specifically rejected this line of argument in *Spiegla I*, holding that Spiegla "spoke as a private citizen on a matter of public concern when she brought the search policy and Hull and Huff's conduct to the attention of her superior." *Spiegla I*, 371 F.3d at 939-40. Accordingly, the law of the case doctrine barred the defendants from raising the issue again on remand or in their appeal from the judgment entered on the jury's verdict. *See EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 796 (7th Cir. 2005). When the defendants filed their opening and reply briefs in this second appeal, they had no basis to challenge anew our holding in *Spiegla I*. Only the Supreme Court's decision in *Garcetti* a few weeks later called *Spiegla I* into question and opened the door for a reexamination of that

decision in this appeal. *Key v. Sullivan,* 925 F.2d 1056, 1060 (7th Cir. 1991) (stating that "a decision of the Supreme Court after the first review" triggers an exception to law of the case). Waiver under Rule 28(a)(5) of the Federal Rules of Appellate Procedure occurs when a party omits an available argument. *United States v. Feinberg,* 89 F.3d 333, 340-41 (7th Cir. 1996). A party cannot, however, waive an argument that did not exist when he submitted his brief. *Id.; see United States v. Henningsen,* 387 F.3d 585, 591 (7th Cir. 2004).

Spiegla also argues that the defendants picked the wrong procedural vehicle in which to raise *Garcetti.* She claims that rather than file a "motion to discuss supplemental authority," the defendants should have brought *Garcetti* to our attention by filing a letter pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure. The first flaw in Spiegla's argument is that a "motion to discuss supplemental authority" does not accurately characterize the defendants' post-*Garcetti* motion. Their motion simply requested a supplemental briefing schedule in light of *Garcetti.*

Second, the defendants were right to respond to *Garcetti* by requesting additional briefing rather than submitting a Rule 28(j) letter. Rule 28(j) permits parties to briefly apprise the court of new or previously undiscovered authority pertinent to arguments made orally or in the briefs. FED. R. APP. P. 28(j) ("The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally."). It does not, however, provide a second forum in which to raise wholly new or different arguments. *See United States v. Jones,* 308 F.3d 425, 427 n.1 (4th Cir. 2002). Rule 28(j) letters are limited to 350 words. Because *Garcetti* armed

the defendants with a new argument against the soundness of *Spiegla I* based on new controlling authority, they properly requested additional briefing rather than submit a Rule 28(j) letter. The issue of whether *Garcetti* requires us to revisit *Spiegla I* is ill-suited for a 350-word Rule 28(j) letter.

### B. The Effect of *Garcetti*

We held in *Spiegla I* that Spiegla's speech was protected, but because the judgment in this case is not yet final, we are obliged to reevaluate that holding in light of *Garcetti*. *See Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule . . . must be given full retroactive effect in all cases still open on direct review. . . ."). More specifically, we must reexamine whether Spiegla's statements to the assistant superintendent qualify for First Amendment protection under the standard articulated in *Garcetti*. The "inquiry into the protected status of speech is one of law, not fact." *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983).

Whether public-employee speech is protected is determined by reference to the two-part *Connick-Pickering* test. *Spiegla I*, 371 F.3d at 935. First, we inquire whether the employee "spoke as a citizen on a matter of public concern." *Id.* (citing *Connick*, 461 U.S. at 138). If not, the employee has no cause of action for First Amendment retaliation and there is no need to reach the second part of the test, which requires a balancing of the employee's interest "as a citizen in commenting on the matter" against the public employer's interest "as [an] employer[ ] in promoting effective and efficient public service." *Id.* at

940 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)); *see Garcetti*, 126 S. Ct. at 1960. Prior to *Garcetti*, we considered the "content, form, and context" of the employee's speech to determine whether the employee spoke as a citizen on a matter of public concern, with content being the most important factor. *Spiegla I*, 371 F.3d at 935 (quoting *Connick*, 461 U.S. at 147-48); *Gustafson v. Jones*, 290 F.3d 895, 907 (7th Cir. 2002).

After *Garcetti*, however, the threshold inquiry is whether the employee was speaking as a citizen; only then do we inquire into the content of the speech. *Mills v. City of Evansville*, 452 F.3d 646, 647-48 (7th Cir. 2006). *Garcetti* made clear that public employees speaking "pursuant to their official duties" are speaking as employees, not citizens, and thus are not protected by the First Amendment regardless of the content of their speech. *See Garcetti*, 126 S. Ct. at 1959-60. Consequently, the operative question now is whether Spiegla made her statements to Assistant Superintendent Schrader pursuant to her official duties as a correctional officer.

Based on the record as a whole, we conclude that Spiegla was speaking pursuant to her official duties – not as a citizen – when she told Schrader about the conduct of Hull and Huff, and about Moody's action in preventing her from conducting a search. As a correctional officer assigned to the main gate, Spiegla's primary responsibility was to regulate and monitor the vehicle and foot traffic through the gate. This involved searching incoming vehicles and people for contraband, tasks for which she received specialized training. Written prison "post orders" dictated who and what were subject to search, and Spiegla's employment required her to faithfully follow those orders. As a correctional officer, she also had a more

general responsibility to keep the facility secure and report any suspicious behavior by prison inmates, staff, or visitors to her superiors.

Spiegla became suspicious when she saw Hull and Huff transfer bags to their state truck from their private cars. As they approached the gate, she got up to discharge her official duty – search the truck (as she did all vehicles) and "make sure there was nothing in those bags." When her immediate supervisor, Sergeant Moody, told her not to search the truck, she disagreed based on her understanding that "regardless of who you are, you are to be searched." Upset that she "could not go out there and do [her] job," Spiegla noted the incident in her log.

Later that day while still in uniform and on duty at the main gate, Spiegla saw Assistant Superintendent Schrader and explained to him that Moody stopped her from searching the truck of two "higher ups" she believed should have been searched. Spiegla recounted the incident to Schrader pursuant to her responsibility as a correctional officer to inform her superiors of a possible breach in prison search policy, especially one involving two senior prison officers. In doing so she spoke as an employee, not a citizen, because ensuring compliance with prison security policy was part of what she was employed to do. *See Garcetti,* 126 S. Ct. at 1960.

We acknowledged in *Spiegla I* that Spiegla's statements were "consistent with her general duty as a correctional officer to keep the facility secure." 371 F.3d at 939. We went on to conclude, however, that because they "were not part and parcel of her core function[]" to implement but not question prison security policies, "she acted beyond her employment capacity and spoke as a private citizen on

a matter of public concern." *Id.* This focus on "core" job functions is too narrow after *Garcetti,* which asked only whether an "employee's expressions [were] made pursuant to official responsibilities." *Garcetti,* 126 S. Ct. at 1961. Because Spiegla reported the possible security breach to Schrader as part of her official responsibility as a correctional officer to keep the prison secure, her speech was not "citizen" speech protected by the First Amendment. This holding is consistent with the early post-*Garcetti* precedent in this and other circuits. *Compare Mills,* 452 F.3d at 647-48 (police sergeant critical of her boss's personnel decision spoke as employee, not citizen), *Hill v. Borough of Kutztown,* 455 F.3d 225, 242 (3d. Cir. 2006) (borough manager who relayed worker complaints to borough council spoke as part of his duties as manager, not a citizen), *and Freitag v. Ayers,* 463 F.3d 838, 855 (9th Cir. 2006) (correctional officer did not speak as a citizen when she made internal reports to superiors about inmate sexual misconduct), with *Fuerst v. Clarke,* 454 F.3d 770, 774 (7th Cir. 2006) (deputy sheriff spoke as citizen because he made a public statement in his capacity as a union representative), *and Freitag,* 463 F.3d at 854 (correctional officer spoke as a citizen by sending letters to a state legislator and the state inspector general).

That Spiegla's statements highlighted potential misconduct by prison officers does not change the fact that she was speaking pursuant to her official responsibilities, not as a citizen "contributi[ng] to the civic discourse." *Garcetti,* 126 S. Ct. at 1960. The memo at issue in *Garcetti* also pointed to serious official misconduct – possible misrepresentations made by a deputy sheriff in a warrant affidavit. But the assistant district attorney who wrote it was responsible for supervising warrant applications;

because this was one of "the tasks he was paid to perform," he "acted as a government employee" when he wrote the memo and his speech was not protected. *Id.*

Similarly here, Spiegla "acted as a government employee" when she reported the possible misconduct to her superior and sought clarification of a security policy she felt may have been breached. She did not make a public statement, discuss politics with a coworker, write a letter to newspapers or legislators, or otherwise speak as a citizen. *See id.* at 1960, 1961 (listing examples of prototypical protected speech by public employees). Because Spiegla did not speak as a citizen under the standard articulated in *Garcetti,* she has no claim for First Amendment retaliation under § 1983.

Accordingly, the judgment entered in Spiegla's favor must be vacated, but not without our observation that the record and the jury's verdict substantiate that Spiegla was punished for simply trying to follow the rules. *Garcetti* instructed that public employers should, "'as a matter of good judgment,' be 'receptive to constructive criticism offered by their employees.'" *Garcetti,* 126 S. Ct. at 1962 (quoting *Connick,* 461 U.S. at 149). Our holding here, however, is a straightforward application of the principle in *Garcetti* that there is not a "constitutional cause of action behind every statement a public employee makes in the course of doing his or her job." *Id.* The judgment is VACATED and the case is REMANDED to the district court with instructions to enter judgment for the defendants.

A true Copy:

Teste:

*Clerk of the United States Court of Appeals for the Seventh Circuit*

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF INDIANA**
**HAMMOND DIVISION AT LAFAYETTE**

| | |
|---|---|
| NANCY SPIEGLA,<br><br>Plaintiff,<br><br>v.<br><br>MAJOR EDDIE HULL, Individually as an employee of Westville Correctional Facility; HERB NEWKIRK, Individually as Superintendent of Westville Correctional Facility; and BERNARD JOHNSON, Individually as an employee of Westville Correctional Facility,<br><br>Defendants. | Cause No. 4:01cv0075 AS |

**ORDER**

(Filed Mar. 30, 2007)

In accord with the opinion of the Court of Appeals entered March 30, 2007, this court is required to vacate the judgment in favor of the plaintiff for $210,000.00 and costs entered previously after a jury trial in this case, which had been conducted under an earlier mandate of the Court of Appeals. This court has no choice but to follow the mandate of the Court of Appeals, but does so very reluctantly. Therefore, it is **ORDERED** that the money judgment in favor of the plaintiff is **VACATED** and each party will bear its own costs. **IT IS SO ORDERED**.

**DATED:** March 30, 2007

**S/ ALLEN SHARP**
**ALLEN SHARP, JUDGE**
**UNITED STATES**
**DISTRICT COURT**

**In the**
**United States Court of Appeals**
**for the Seventh Circuit**

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No. 03-2480

NANCY SPIEGLA,

*Plaintiff-Appellant,*

*v.*

MAJOR EDDIE HULL, Individually and as an Employee of Westville Correctional Facility, HERB NEWKIRK, Individually and as Superintendent of Westville Correctional Facility, and BERNARD JOHNSON, Individually and as an Employee of Westville Correctional Facility,

*Defendants-Appellees.*

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Appeal from the United States District Court
for the Northern District of Indiana,
Hammond Division.
No. 01 CV 0075 – **Allen Sharp**, *Judge*.

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ARGUED JANUARY 14, 2004 – DECIDED JUNE 14, 2004

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Before FLAUM, *Chief Judge*, and POSNER and DIANE P. WOOD, *Circuit Judges*.

FLAUM, *Chief Judge*. Correctional officer Nancy Spiegla's shift schedule and post assignment were changed four days after she had a conversation with the Assistant Superintendent of Westville Correctional Facility ("Westville" or "the

facility") in which she questioned a new vehicle search policy and reported the suspicious behavior of two Westville employees. In response to her schedule change and transfer, Spiegla filed a 42 U.S.C. § 1983 suit against Major Eddie Hull, Herb Newkirk, and Bernard Johnson ("the Defendants"), officials and employees of Westville, alleging that they unlawfully retaliated against her for exercising her First Amendment rights. At the time relevant to the complaint, Newkirk was the Superintendent, Johnson was the Assistant Superintendent of Operations, and Hull was Major of Westville. The district court granted the Defendants' motion for summary judgment on the bases that Spiegla's speech was not constitutionally protected and that she was not reassigned because of her speech. Spiegla now appeals the district court's ruling. For the reasons stated herein, we reverse the judgment of the district court and remand the case for proceedings consistent with this opinion.

## I. Background

In 1985, Spiegla began her employment as a correctional officer at Westville, a state prison in Westville, Indiana. Between 1993 and 1999, Spiegla was transferred back and forth between posts on the front and back gates of the facility and was responsible for searching persons and vehicles entering the prison. During her years on gate duty, Spiegla developed expertise in conducting vehicle searches, particularly ones of large trucks. Spiegla's competency as a gate officer is undisputed. Defendant Newkirk even presented her with Westville's "Correctional Officer of the Year" award just a few months before the transfer at issue in this case occurred.

On Thursday, January 13, 2000, Spiegla was working on the front gate under the direction of Sergeant Brian Moody. While on duty, Spiegla observed Defendant Hull and Captain Ernest Huff, while in a state-owned vehicle, enter the staff and visitors' parking lot located on the outside of the facility and near the front gate. According to Spiegla, the two men removed bags from their private vehicles, placed the bags into the state-owned vehicle, and then drove towards the front gate. Based on these observations, Spiegla told Moody that she intended to search the state-owned vehicle. Moody instructed Spiegla not to conduct the search and informed her of a new exemption policy for searches of state-owned vehicles. Whereas under the previous policy all incoming vehicles were searched for contraband, the new policy exempted state-owned vehicles from being searched.

Apparently, this was not the first time that Hull and Huff attracted the attention of gate security. Moody had previously witnessed the two men drive their vehicle into the staff and visitors' parking lot while they were conducting "perimeter checks" (a security check that entails driving around the facility to inspect the fence). Moreover, on several recent occasions, Moody had attempted to search vehicles occupied by Hull and Huff and on each occasion they refused to consent to search before entering the facility.[1]

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[1] We accept the position throughout this opinion that Hull and Huff's behavior was highly suspicious and consistent with contraband trafficking. For the purposes of this case, we are only concerned with the suspicious appearance of their conduct. We readily acknowledge that there is no indication that these two individuals actually were engaged in smuggling contraband and no charges were ever brought against them.

Spielga explained in her deposition that after Moody told her about the new policy, "I duly noted it in my log because I was very upset over it because everybody has to go through the shakedown procedure. . . ." When asked to clarify her feelings, she responded, "I was just upset because I could not go out there and do my job." Spiegla said that she was not angry, but "[j]ust, you know, frustrated type of thing. You know, just like, You got to be kidding? That type of attitude."

Later that day, Spiegla discussed Hull and Huff's conduct and the new search policy with the Assistant Superintendent of Westville, John Schrader. Specifically, Spielga asked him when the search orders changed and whether he was aware that state vehicles were not to be searched. Schrader responded that all vehicles were to be "shaken down" and then he asked her why she asked. Spiegla then told Schrader about her observations of Hull and Huff and Moody's instruction not to "shake them down." Schrader agreed that the two men should have been "shook down" and assured Spiegla that he would bring the matter to the attention of Superintendent Newkirk.

Either later that day or the following day, Schrader recounted his conversation with Spiegla at an executive staff meeting attended by Schrader, Johnson, Hull, and Newkirk. Johnson acknowledges that he was "pretty pissed" that Spiegla's concerns were raised at the meeting. Though Johnson did not express his feelings at the meeting, he was "mad at Spielga" because she did not follow her chain of command.

The following Monday, January 17, 2000, four days after her conversation with Schrader, Spiegla learned that

she was being transferred[2] from the front gate. That morning, Captain Hugh Vales called Spiegla at the front gate and asked her what she had done wrong. When she responded that she did not know what he was talking about, Captain Vales informed her that she had been transferred and that her shift schedule had been changed from five days on and two days off ("5-2") to the less desirable six days on and two days off ("6-2"). Thereafter, Spiegla was assigned to various non-gate perimeter postings that differed on a day-to-day basis. At these postings, Spiegla had no opportunity to use her vehicle searching expertise. Moreover, these were mobility-intensive postings that were painful for Spiegla to perform because of an osteoarthritic condition. As a result of the physical hardships she faced at the perimeter posts, Spiegla applied for the position of Teacher's Assistant IV in April 2000. In accepting this position, Spiegla suffered a 4 ½% reduction in pay. The following month, Spiegla's pay was further reduced.

The record does not reveal who precisely effectuated Spiegla's January 2000 transfer to a non-gate post. Though none of the Defendants have admitted to effectuating the transfer, all of them possessed authority to do so. However, all the Defendants acknowledge involvement in the decision effectuating Speigla's change in shift.

In December 2001, Spiegla filed suit against the Defendants under § 1983, alleging a deprivation of her rights secured by the First and Fourteenth Amendments

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[2] The Defendants contend that Spiegla was not transferred, but rather reassigned, as she continued to remain a correctional officer. We recognize that Westville may make a technical distinction between the two terms, but we will use "transfer" for simplicity's sake.

to the United States Constitution. After the close of discovery, the Defendants filed a motion for summary judgment. The district court granted the Defendants' motion determining that the speech at issue was not addressed to a matter of public concern and that Spiegla did not suffer an adverse action as a result of her speech. Spiegla appeals that decision, as well as the district court's denial of her motion to compel the production of documents.

## II. Discussion

### A. First Amendment Claim

We review *de novo* the district court's grant of summary judgment. *See Dunn v. City of Elgin,* 347 F.3d 641, 645 (7th Cir. 2003). A grant of summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue of material fact "exists when 'there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.'" *Puckett v. Soo Line Ry. Co.,* 897 F.2d 1423, 1425 (7th Cir. 1990) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986)). On appellate review, we review the facts and inferences in the light most favorable to the nonmoving party. *See Haefling v. UPS,* 169 F.3d 494, 497 (7th Cir. 1999). Summary judgment is inappropriate when alternate inferences can be drawn from the available evidence. *See Hines v. British Steel Corp.,* 907 F.2d 726, 728 (7th Cir. 1990).

In evaluating a § 1983 claim for retaliation in violation of First Amendment rights in the public employment context, we apply a three-step analysis premised on the Supreme Court's decision in *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274 (1977). First, we must determine whether the employee's speech was constitutionally protected. Second, the plaintiff must establish that the speech was a substantial or motivating factor in the retaliatory action. Third, the defendant has an opportunity to establish that the same action would have been taken in the absence of the employee's protected speech. *See Sullivan v. Ramirez,* 360 F.3d 692, 697 (7th Cir. 2004); *Vukadinovich v. Bd. of Sch. Trs.,* 278 F.3d 693, 699 (7th Cir. 2002); *Kokkinis v. Ivkovich,* 185 F.3d 840, 843 (7th Cir. 1999).

1. Protected Speech

Public employees are entitled to free speech rights under the First Amendment. *See Pickering v. Bd. of Educ.,* 391 U.S. 563, 568 (1968). At the same time, the government must have the ability to run efficiently as an employer. *See Sullivan,* 360 F.3d at 697. To balance these interests, the Supreme Court has held that the government may not punish the speech of a public employee if it involves matters of public concern unless the state can prove that the needs of the government outweigh the speech rights of the employee. This principle forms the basis of the two-part inquiry known as the *Connick-Pickering* test that courts use to determine whether speech is constitutionally protected. *Id.*

a. Matter of Public Concern

First, under the *Connick* prong, we must decide whether Spiegla spoke as a citizen on a matter of public concern by considering the "content, form, and context of [the contested] statement, as revealed by the whole record." *Connick v. Myers,* 461 U.S. 138, 147-48 (1983). Of these three factors, the content of the speech is considered to be the most important. *See Gustafson v. Jones,* 290 F.3d 895, 907 (7th Cir. 2002). Speech that serves a private or personal interest, as opposed to a community one, does not satisfy the standards for First Amendment protection. *Id.* Therefore, to determine whether Spiegla's speech addressed a matter of public concern, "we must apply the content, form, and context criteria, as set forth in *Connick,* mindful that a personal grievance of interest only to the employee does not qualify as a matter of public concern." *Sullivan,* 360 F.3d at 699.

The speech at issue in this case consists of Spiegla's statements to Assistant Superintendent Schrader regarding (1) the state-owned vehicle search exemption policy and (2) the behavior of Hull and Huff.[3] Without doubt, issues of prison security, public safety, and official corruption are matters of concern to the community, particularly to one hosting a correctional facility. An inmate in possession of a weapon can pose a threat to prison employees, other inmates, and the surrounding community itself. Here, the concern is not merely hypothetical, as numerous

[3] Spiegla contends that she was also retaliated against for the statements she made to Sergeant Moody. However, there is no evidence in the record to suggest that any of the Defendants actually knew of her conversation with Moody. Accordingly, we will focus our analysis on Spiegla's conversation with Schrader.

articles were featured in the *South Bend Tribune* and *Indianapolis Star* detailing the serious problems at Westville concerning contraband trafficking and official corruption. *See, e.g.,* Editorial, *Prison extortion claim demands close examination,* South Bend Tribune, August 14, 2000, at A7; Matthew S. Galbraith, *Three investigators suspended at Westville,* South Bend Tribune, May 27, 1998, at B1; James A. Gillaspy, *Drug probe in prisons now focus on employees,* Indianapolis Star, July 11, 1993, at 1; Matthew S. Galbraith, *The Living Hell of Westville,* South Bend Tribune, October 31, 1993, at A5. While not dispositive of whether speech relates to a matter of public concern, the fact that the press takes interest in the matter is relevant to the determination. *See Gustafson,* 290 F.3d at 907.

On the other hand, simply because speech relates to prisons does not automatically render it a matter of public concern. *See, e.g., Button v. Kibby-Brown,* 146 F.3d 526 (1998) (prison employee's complaints regarding his supervisor's refusal to return donated educational materials not a matter of public concern). Speech by a government employee relating to ordinary matters of internal operation and lacking connection to "any matter of political, social, or other concern to the community" is not entitled to First Amendment protection. *Connick,* 461 U.S. at 146. *Connick* itself involved an assistant district attorney's objections to various policies and conditions in her office. The Supreme Court determined that her complaints relating to intra-office transfer policies, office morale, and grievance procedures were "internal office affairs" and thereby not entitled to First Amendment protection. *Id.* at 149. Clearly, complaints of this sort relating to prison operations would receive similar treatment. As we observed in *Kuchenreuther v. City of Milwaukee*:

> While speech addressing matters of police protection and public safety are matters of public concern, we have cautioned that if every facet of internal operations within a governmental agency were of public concern, and therefore any employee complaint or comment upon such matters constitutionally protected, no escape from judicial oversight of every governmental activity down to the smallest minutia would be possible.

221 F.3d 967, 974-975 (7th Cir. 2000) (internal quotations and citations omitted).

However, the speech in this case is readily distinguishable from complaints concerning ordinary office policy and can even be separated out from comments addressing prison security and public safety matters in general. Not only did Spiegla bring critical attention to a policy that had the potential to compromise prison security, she reported the suspicious conduct of two of her superiors who appeared to be using that very policy to facilitate unlawful behavior. Indiana considers the trafficking of contraband with a prison inmate to be a Class A misdemeanor; and a felony if a controlled substance or deadly weapon is involved. IND. CODE ANN. § 35-44-3-9 (West 2004). Clearly, the smuggling of contraband, if proven, would constitute "wrongdoing or breach of public trust," which the Court in *Connick* suggested might qualify speech for protection. 461 U.S. at 148.

Unscrupulous public employees may find ways to exploit the resources and opportunities available to them through their offices. Perhaps the public's best protection against these few wayward individuals is the insider who is willing to speak up and shed light on her colleagues' improprieties. Recognizing the "whistleblower's"

important role, our cases have consistently held that speech alleging government corruption and malfeasance is of public concern in its substance. *See Sullivan,* 360 F.3d at 699 (notations of chronic time abuse by co-workers matters of public concern); *Marshall v. Porter County Plan Comm'n,* 32 F.3d 1215, 1219-20 (7th Cir. 1994) (allegations that co-worker abused county time and funds and violated the state law matters of public concern); *Breuer v. Hart,* 909 F.2d 1035, 1038 (7th Cir. 1990) (complaints that defendant stole county property of public concern in their content); *Ohse v. Hughes,* 816 F.2d 1144, 1151 (7th Cir. 1987) (allegations of inappropriate taking of sick and vacation days and misappropriation of public funds matters of public concern); *see also Eberhardt v. O'Malley,* 17 F.3d 1023, 1027 (7th Cir. 1994) (remarking that "[t]he courts have had to separate the not very socially valuable forms of speech from whistleblowing and other socially valuable expressive activities of public employees," in determining whether contested speech addresses a matter of public concern).

Thus, Spiegla's disclosure of potential malfeasance on the part of Hull and Huff positions her speech, with respect to its content, comfortably on the socially valuable side of the constitutional line. We emphasize that Spiegla's report was not based on rumor or mere hunch. Nor was she tattling on trivial office indiscretions. Rather, Spiegla's speech addressed her direct observations of prison officials engaged in activity consistent with contraband trafficking, a serious violation of state law, at a facility with a history of problems with contraband.

A different case would be presented if Spiegla's questions about the search policy had not been followed by her disclosure of Hull and Huff's suspicious conduct. There

must be a communicative element to speech that puts the listener on alert that a matter of public concern is being raised. Simply seeking clarification on the state of the search policy would likely have been too disconnected from the contraband problem to have raised a matter of public concern. However, when Spiegla's questions about the policy are considered in conjunction with her allegations of malfeasance, it becomes apparent that, in substance, she spoke on a matter of public concern.

The form of Spiegla's speech similarly supports a conclusion that she spoke on a matter of public concern. Spiegla spoke voluntarily with Schrader and initiated the conversation herself. Although it occurred in private, she did not intend that the conversation would be kept confidential. The fact that Spielga "communicated privately with [her] superior[] does not make [her] speech less a matter of public concern." *Delgado v. Jones,* 282 F.3d 511, 518 (7th Cir. 2002) (citing *Givhan v. W. Line Consol. Sch. Dist.,* 439 U.S. 410 (1979) (extending First Amendment protection to private as well as public expression)). Indeed, an employee who attempts to follow internal mechanisms to resolve important issues should not automatically be treated less favorably than the individual who immediately turns to the press or public forum. In this case, Schrader assured Spielga that he would convey her concerns to Newkirk, thereby serving as the conduit through which Spiegla publicized her concerns to the individual with the power to rectify the problems that she perceived.[4]

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[4] Spiegla eventually took her concerns public. *See Corrections officer blames prison staff for contraband,* South Bend Tribune, November 26, 2000, at D2.

Next we consider the context in which the speech arose. At this stage we will consider Spiegla's motive for speaking as a relevant, though not dispositive, factor in determining whether her speech addressed a matter of public concern. *Sullivan,* 360 F.3d at 700. "Motive matters to the extent that even speech on a subject that would otherwise be of interest to the public will not be protected if the expression addresses only the personal effect upon the employee." *Gustafson,* 290 F.3d at 908 (internal quotations and citations omitted). *But see Breuer,* 909 F.2d at 1038-39 (explaining that a "finding that a speaker was motivated by narrow self-interest . . . alone cannot disqualify a speaker from protection. Wrongdoing may often be revealed to the proper authorities only by those who have some personal stake in exposing wrongdoing."). In considering the context of speech, "it is necessary to look at the point of the speech in question: was it the employee's point to bring wrongdoing to light?" *Kokkinis,* 185 F.3d at 844 (internal quotations omitted). The fact that an employee has a personal stake in the subject matter of the speech does not necessarily remove it from the scope of public concern. *Cliff v. Bd. of Sch. Comm'rs,* 42 F.3d 403, 410 (7th Cir. 1994). The critical determination is whether the individual was speaking "more like a citizen or a disgruntled employee whose statements are primarily of personal interest." *Colburn v. Trustees of Ind. Univ.,* 973 F.2d 581, 585 (7th Cir. 1992).

The Defendants contend that Spiegla's speech represented a wholly personal grievance. In support of their position, the Defendants rely on a statement from Spiegla's deposition where she explained that she was upset about the new search policy because it would make it "more difficult to do my job." Accepting the Defendants'

position and finding that Spiegla's speech involved merely personal matters, the district court concluded that, "[Spiegla] voiced her concern over the new policy because she was upset due to the fact that she felt she was not able to do her job." Dist. Ct. Op. at 7.

Although the language she uses in her deposition is ambiguous, Spiegla's testimony indeed supports the conclusion that she was motivated, in part, by a self-interest when she spoke with Schrader. Whether her frustration with the new policy arose from her lost authority to conduct searches, confusion about gate procedures, or simple disagreement with the decision to alter the search routine, it seems evident that Spiegla had at least some personal stake in speaking with Schrader. However, we disagree with the district court's ruling that Spiegla's motivations were exclusively self-interested. Rather, the more compelling interpretation is that Spiegla's frustration with the new policy primarily arose from her belief that it would make keeping contraband out of the prison more difficult. As a veteran employee, Spiegla was familiar with the serious contraband trafficking and corruption problems plaguing Westville.[5] We accept Spiegla's claim that she understood her "job" in terms broader than the simple execution of vehicle searches. Indeed, keeping contraband out of the prison was a "job" that became more "difficult" under the new search policy (as more vehicles would now enter without inspection), while the physical execution of guard duties in fact became easier (as fewer vehicles would need to be searched). That Spiegla spoke in

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[5] Contrary to the Defendants' contention, it is not necessary for Spiegla to have personally witnessed an incident of smuggling for her to know that there was a contraband problem at the facility.

direct response to observing Hull and Huff's suspicious behavior further supports the notion that she had a public motivation. If the goal of her discussion with Schrader was simply to gather information regarding post orders, she might not have made a point of reporting the behavior of Hull and Huff. Against this backdrop, we cannot conclude that Spiegla's motivations for reporting the potentially unlawful conduct of superiors to a high-level prison official were confined to advancing primarily personal objectives.

Furthermore, the district court was misplaced in its reliance on our decision in *Gonzalez v. City of Chicago,* 239 F.3d 939 (7th Cir. 2001) (determining that statements made in a report were not protected speech because report writing was part of the employee's required duties). We explicitly stated in *Delgado v. Jones* that "our holding in *Gonzalez* is limited to the routine discharge of assigned functions, where there is no suggestion of public motivation." 282 F.3d at 519. In *Delgado,* the Court determined that a police detective's memorandum containing information potentially damaging to his superiors was protected speech. *Id.* at 520. The Court emphasized that in contrast to the speech at issue in *Gonzalez,* Delgado's disclosures "went far beyond some rote, routine discharge of an assigned duty" and he had "considerable discretion about how he communicated the information up the chain of command." *Id.* at 519. Similarly, Spiegla departed from the routine performance of her assigned duties when she raised questions about the search policy and the conduct of Hull and Huff. Spiegla's job function was to implement prison security policies, not to question those policies or to report the suspicious activities of her colleagues. The Defendants contend that a failure to communicate her concerns would have been a dereliction of Spiegla's duty (a

surprising position considering that the Defendants also argue that the speech in question was nothing more than an informational inquiry). As we said of a similar argument raised in *Delgado,* "this argument . . . sweeps much too broadly." *Id.* While Spiegla's actions may have been consistent with her general duty as a correctional officer to keep the facility secure, they were not part and parcel of her core functions. Indeed, Spiegla exercised discretionary choice when she decided to go outside her chain of command and disclose her observations to Schrader.

By focusing on the presence of a personal motivation and the fact that Spiegla raised her concerns within the scope of her employment, the district court improperly elevated motivation to a litmus test and thereby undervalued the important content of Spiegla's speech. *See Cliff,* 42 F.3d at 410 (indicating that motive cannot become a litmus test supplanting content in terms of overall importance). We emphasize that the specificity and seriousness of the allegations against Hull and Huff are essential to our refusal to categorize Spiegla's speech as a personal dispute. If we were to decide otherwise, public employees would be chilled from reporting their similar suspicions of government corruption and impropriety. Such a result would be contrary to sound public policy. In sum, viewing the record as a whole, the content, form, and context of Spiegla's speech lead us to the conclusion that she acted beyond her employment capacity and spoke as a private citizen on a matter of public concern when she brought the search policy and Hull and Huff's conduct to the attention of her superior.

b. Balancing of Interests

After determining that Spiegla's speech addressed a matter of public concern, we would ordinarily move to the *Pickering* analysis and balance her interest as a citizen in commenting on the matter against the state's interest, as employer, in promoting effective and efficient public service. *See Pickering,* 391 U.S. at 568; *Waters v. Churchill,* 511 U.S. 661, 675 (1994). However, the Defendants did not make *Pickering*-based arguments in their motion for summary judgment or in their reply brief on appeal. Additionally, they contend that we need not address balancing as the district court did not grant summary judgment on that basis. While it is true that the district court did not engage in a *Pickering* analysis, the Defendants' position is somewhat complicated by a sentence in the district court's order reading in relevant part that "[t]he failure to satisfy either prong of the *Connick-Pickering* test renders Spiegla's section 1983 claim meritless. . . ." Dist. Ct. Op. at 8-9. Assuming that the district court held in the alternative (as opposed to misstating its holding), we conclude that summary judgment was inappropriate on a *Pickering* basis given that the issue was not presented in the Defendants' motion for summary judgment and that the district court was silent on the basic underlying facts or legal reasoning that supported its determination. *See Schiller v. Moore,* 30 F.3d 1281, 1284 (10th Cir. 1994) (finding summary judgment inappropriate on the basis of the *Pickering* test where district court's opinion was silent as to reasoning it employed and parties had not made strong showing as to their relative interests); *see also Roe v. City of San Diego,* 356 F.3d 1108, 1122 (9th Cir. 2004) (remanding case for further proceedings where district court did not reach *Pickering* balancing phase). We note that as *Pickering* is a question of law, it

will be the responsibility of the district court to balance the parties' interests as revealed by the record on the appropriate motion.

c. Qualified Immunity

In their motion before the district court, the Defendants argued that they were entitled to summary judgment on the basis of qualified immunity. The defense of qualified immunity "is designed to protect government agents 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Knox v. Smith,* 342 F.3d 651, 657 (7th Cir. 2003) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). However, because the *Pickering* analysis is essential to the determination of whether a constitutional violation occurred in this case, we cannot now reach the issue of qualified immunity. *See Saucier v. Katz,* 533 U.S. 194, 201 (2001) (holding that before determining whether a right was clearly established, courts must first determine whether, taking the facts in the light most favorable to the plaintiff, the official violated a constitutional right); *see also Sullivan,* 360 F.3d at 697.

2. Causation

Before discussing whether the evidence supports a causal link between Spiegla's speech and her transfer and schedule change, we will briefly address the Defendants' contention that Spiegla did not suffer a sufficiently adverse employment action. The Defendants argue that Spiegla suffered no harm since she had agreed in writing to be available for assignment to any shift and that all of

her assignments fell under the broad category of "perimeter duty" (a duty involving a variety of posts including gate security, escorting prisoners between complexes, and "towers.") However, a § 1983 case does not require an adverse employment action within the meaning of the antidiscrimination statutes, such as Title VII of the Civil Rights Act of 1964. *See Power v. Summers,* 226 F.3d 815, 820 (7th Cir. 2000). Rather, *"[a]ny* deprivation . . . that is likely to deter the exercise of free speech . . . is actionable." *Id.* (citing *Bart v. Telford,* 677 F.2d 622, 624 (7th Cir. 1982) (explaining that minor harassment, including making fun of an employee for bringing a birthday cake to the office, may be sufficient to deter the exercise of First Amendment rights)). Certainly, we cannot hold as a matter of law that transfer to a more physically demanding and less skilled post and an unfavorable change in schedule – even though such actions may have been permissible under the terms of her employment – are insufficient to deter the exercise of free speech.[6]

Turning to the motivating factor issue, Spiegla must establish a causal link between the contested speech and her transfer and schedule change. *See Mt. Healthy,* 429 U.S. at 287. That is, she must establish by a preponderance of the evidence that a motivating factor in the Defendants' action was retaliation. *See Rakovich v. Wade,* 850

[6] We do, however, reject Spiegla's contention that the pay cut she received after being assigned to the position of Teacher Assistant IV is evidence of an adverse action. Although Spiegla may have felt "forced" to apply for the position, the fact of the matter is that the application was voluntary and no evidence suggests that any of the Defendants compelled her to apply. Furthermore, the additional reduction in pay Spiegla received after working in the Teacher Assistant IV position for a month is too remote from her speech to support a causal link.

F.2d 1180, 1189 (7th Cir. 1988) (en banc). "This [C]ourt has stated that, in order to carry his or her [motivating factor] burden, the plaintiff must show 'had it not been for the violation, the injury of which [s]he complains would not have occurred. . . .'" *Id.* (citing *Button v. Harden,* 814 F.2d 382, 383 (7th Cir. 1987)); *see also Galdikas v. Fagan,* 342 F.3d 684, 696 (7th Cir. 2003); *Abrams v. Walker,* 307 F.3d 650, 654 (7th Cir. 2002); *O'Connor v. Chicago Transit Auth.,* 985 F.2d 1362, 1368 (7th Cir. 1993). As pointed out recently in *Johnson v. Kingston,* 292 F.Supp.2d 1146, 1155-56 (W.D. Wis. 2003), this requirement creates an anomaly with the next step of the *Mt. Healthy* burden-shifting analysis, which provides that once the plaintiff has made her showing, the burden shifts to the defendants to prove by a preponderance of the evidence that they would have taken the same actions regardless of the plaintiff's protected conduct. *See Mt. Healthy,* 429 U.S. at 287; *see also Galdikas,* 342 F.3d at 696 (if plaintiff meets burden of showing that challenged action would not have occurred "but for" the constitutionally protected conduct, "the burden shifts to the defendant, who must show by a preponderance of the evidence that he would have taken the same actions even in the absence of the protected conduct."). Logically, if the plaintiff shows by a preponderance of the evidence that had it not been for the protected activity her injury would not have occurred, it would not be possible for the defendant to then prove by a preponderance of the evidence that the injury would have occurred regardless of the protected activity. This approach requires the plaintiff to carry so much of the burden that nothing remains to shift to the defendant to prove.

Therefore, we disavow the requirement that a plaintiff alleging First Amendment retaliation has the burden of

proving but-for causation as recited in the following cases: *Galdikas,* 342 F.3d at 696; *Abrams,* 307 F.3d at 654; *Love v. City of Chicago Bd. of Educ.,* 241 F.3d 564, 569 (7th Cir. 2001); *Thomsen v. Romeis,* 198 F.3d 1022, 1027 (7th Cir. 2000); *Johnson v. Univ. of Wis.-Eau-Claire,* 70 F.3d 469, 482 (7th Cir. 1995); *O'Connor,* 985 F.2d at 1368; *Rakovich,* 850 F.2d at 1190; *Button,* 814 F.2d at 383.[7] The relevant burden language used in these cases is inconsistent with the majority of Seventh Circuit cases discussing First Amendment retaliation claims[8] and contrary to the rule applied in the other eleven regional circuits.[9] Accordingly,

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[7] This opinion has been circulated among all judges of this Court in regular and active service in accordance with Seventh Circuit Rule 40(e). No judge favored a rehearing en banc on the question of whether to retract any suggestion in earlier decisions that the plaintiff in a First Amendment retaliation case must establish but-for causation.

[8] Indeed, the majority of Seventh Circuit cases discussing First Amendment retaliation claims do not characterize the motivating factor requirement as a but-for test. *See, e.g., Smith v. Dunn,* No. 03-2777, 2004 WL 1049131, at *3 (7th Cir. May 11, 2004); *McGreal v. Ostrov,* No. 02-3405, 2004 WL 1041520, at *10 (7th Cir. May 10, 2004); *Williams v. Seniff,* 342 F.3d 774, 782 (7th Cir. 2003); *Nieves v. Bd. of Educ.,* 297 F.3d 690, 693 (7th Cir. 2002); *Vukadinovich v. Bd. of Sch. Trs.,* 278 F.3d 693, 699 (7th Cir. 2002); *Horwitz v. Bd. of Educ.,* 260 F.3d 602, 618 (7th Cir. 2001); *Pugh v. City of Attica,* 259 F.3d 619, 630 (7th Cir. 2001); *Klunk v. County of Joseph,* 170 F.3d 772, 775 (7th Cir. 1999); *Gooden v. Neal,* 17 F.3d 925, 928 (7th Cir. 1994); *Fleming v. County of Kane,* 898 F.2d 553, 558 (7th Cir. 1990); *Conner v. Reinhard,* 847 F.2d 384, 393 (7th Cir. 1988); *McClure v. Cywinski,* 686 F.2d 541, 545 (7th Cir. 1982).

[9] No other circuit requires plaintiffs to show but-for causation in order to satisfy their burden. *See Guilloty Perez v. Pierluisi,* 339 F.3d 43, 56 n.11 (1st Cir. 2003) (explaining that First Amendment plaintiff's burden of proving motivation under *Mt. Healthy* test is more substantial than the burden of producing prima facie evidence in a Title VII case, but not requiring plaintiff to show but-for causation); *Coogan v. Smyers,* 134 F.3d 479, 484 (2d Cir. 1998) (substantial or motivating factor burden not defined as a but-for test); *Merkle v. Upper Dublin Sch. Dist.,* 211 F.3d 782, 795 (3d Cir. 2000) ("Where a reasonable inference

(Continued on following page)

we follow the approach delineated in the majority of our cases, adopted in our sister circuits, and compelled by *Mt. Healthy* itself, i.e., a plaintiff alleging First Amendment retaliation must prove by a preponderance of the evidence that his or her protected activity was a motivating factor in the defendant's retaliatory action. To clarify, a motivating factor does not amount to a but-for factor or to the only factor, but is rather a factor that motivated the defendant's actions. As we said in *Klunk v. County of St. Joseph,* "[i]f the speech addresses a matter of public concern, the employee must show that the protected speech caused, or at least played a substantial part in, the employer's decision" to take adverse employment action against the plaintiff. 170 F.3d 772, 775 (7th Cir. 1999). Once the plaintiff proves that an improper purpose was a motivating factor, the burden shifts to the defendant, as mandated

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can be drawn that an employee's speech was at least one factor considered by an employer in deciding whether to take action against the employee, the question of whether the speech was a motivating factor in that determination is best left to the jury."); *Wagner v. Wheeler,* 13 F.3d 86, 90-91 (4th Cir. 1993) (not requiring plaintiff to show but-for causation); *Brady v. Fort Bend County,* 145 F.3d 691, 710-11 (5th Cir. 1998) (burden shifts if plaintiff proves that her speech activities were a substantial consideration that influenced defendant's decision not to rehire); *Sowards v. Loudon County,* 203 F.3d 426, 433-35 (6th Cir. 2000) (requiring but-for causation to be shown by the defendant, but not the plaintiff); *Taylor v. Cochran,* 830 F.2d 900, 903 (8th Cir. 1987) (same); *Allen v. Iranon,* 283 F.3d 1070, 1076 (9th Cir. 2003) (same); *Copp v. Unified Sch. Dist.,* 882 F.2d 1547, 1553-54 (10th Cir. 1989) (same); *Leonard v. Columbus,* 705 F.2d 1299, 1303-04 (11th Cir. 1983) (same); *Clark v. Library of Congress,* 750 F.2d 89, 101 n.25 (D.C.Cir. 1984) (plaintiff only need to show substantial factor, not only factor). *But see Ezekwo v. NYC Health & Hosp. Corp.,* 940 F.2d 775, 780 (2d Cir. 1991) (standalone Second Circuit case requiring plaintiff to "establish . . . that the speech played a substantial part in the employer's adverse employment action; i.e., that the adverse action would not have occurred *but for* the employee's protected actions.").

by *Mt. Healthy,* to prove by a preponderance of the evidence that the same actions would have occurred in the absence of the protected conduct.

In this case, Spiegla readily satisfies her burden. She has demonstrated by a preponderance of the evidence that her comments to Schrader were a substantial or motivating factor in her transfer and shift change. "It is settled in this Circuit that, 'a plaintiff may establish . . . a causal link between protected expression and adverse action through evidence that the [adverse action] took place on the heels of protected activity.'" *Adusumilli v. City of Chicago,* 164 F.3d 353, 363 (7th Cir. 1998) (quoting *Dey v. Colt Const. & Dev. Co.,* 28 F.3d 1446, 1458 (7th Cir. 1994)).[10] Not only did just four days (including the weekend) elapse between Spiegla's conversation with Schrader and her transfer and schedule change, it came after seven years of uninterrupted postings on the prison gates. *See Collins v. Illinois,* 830 F.2d 692, 704-05 (7th Cir. 1987) (plaintiff's uninterrupted two-year tenure shows causal connection). Moreover, Johnson admitted that he was "pretty pissed" that Spiegla's comments were raised at the executive staff meeting and he said that he was "mad at Ms. Spiegla." Taken together, the closely related sequence of events, Spielga's long and uninterrupted tenure, and Johnson's anger with Spiegla demonstrate that Spiegla's speech was a motivating factor in the decisions to transfer her and to change her shift.

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[10] *Adusumilli* and *Dey* are Title VII cases. but, in this Circuit "the causation analysis for a § 1983 retaliation claim tracks the causation analysis for a Title VII retaliation claim." *Johnson v. Univ. of Wis.-Eau-Claire,* 70 F.3d 469, 482 (7th Cir. 1995).

Moreover, we are unpersuaded by the Defendants' contentions that they would have taken the same action in absence of Spiegla's protected speech. The Defendants argue that Spiegla's removal from the front gates resulted from normal variance in officers' post assignments. This argument is undermined by Spiegla's seven years of continuous assignments to gate posts. As for the shift change, the Defendants point to evidence in the record showing that in 2000 a number of positions were converted from (5-2) schedules to (6-2) schedules to reduce the amount of overtime the facility paid. While it is undisputed that these conversions occurred, the record does not compel a conclusion that Spiegla's schedule change was part of this reorganization. A document produced by the Defendants entitled, "TRANSFERS EFFECTIVE MAY 21, 2000" lists the names of sixteen employees who were indeed transferred from (5-2) groups. However, as is made apparent by the document's title, these transfers took place over four months after Spiegla's schedule had been switched. As the Defendants have not presented evidence identifying any other individual who underwent a shift conversion around the same time that Spiegla did, we cannot conclude by a preponderance of the evidence that she was not subjected to isolated treatment.

B. Motion to Compel

Lastly, we consider Spiegla's claim that the district court improperly denied her motion to compel the production of documents. We conclude there is no basis to overturn the district court's decision. Trial courts have broad discretion over discovery matters and we review a district court's pretrial discovery rulings for an abuse of discretion. *Rennie v. Dalton,* 3 F.3d 1100, 1110 (7th Cir. 1993).

Spiegla's argument that the district court's decision should be reversed is premised on her discovery of relevant documents through other channels (her union) that the Defendants should have had copies of but did not turn over. However, obtaining unproduced documents, by itself, does not demonstrate that the district court abused its discretion in denying motions to compel or that it erroneously limited discovery.

## III. Conclusion

The judgment of the lower court is REVERSED and we REMAND the case for proceedings consistent with this opinion.

A true Copy:

Teste:

*Clerk of the United States Court of Appeals for the Seventh Circuit*

**United States District Court**

**Northern District of Indiana**

NANCY SPIEGLA

Plaintiff

v.

EDWARD HULL, "Eddie"; Individually as an Employee of Westville Correctional Facility, HERB NEWKIRK, Individually as Superintendent of Westville Correctional Facility, and BERNARD JOHNSON, Individually as an employee of Westville Correctional Facility,

Defendants

JUDGMENT IN A CIVIL CASE

**Case No. 4:01cv75AS**

(Filed July 22, 2005)

[X] **Jury Verdict.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] **Decision by Court.** This action came to trial, hearing or consideration before the Court. The issues have been tried, heard or considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Court orders the Clerk to enter separately three judgments. The jury finds for the plaintiff, Nancy Spiegla, and against the defendant, Edward Hull in the sum of $70,000.00. Costs assessed in favor of plaintiff and against defendant.

Stephen R. Ludwig, Clerk

By s/ Cannie S. Inman
Deputy Clerk

**Equivalent Coupon Issue Yield**: 4.05%

This document entered pursuant to Rules 79(a) and 58 of the Federal Rules of Civil Procedure on **July 22, 2005**.

**United States District Court**

**Northern District of Indiana**

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**United States Court of Appeals**
For the Seventh Circuit
Chicago, Illinois 60604

May 30, 2007

Before

Hon. FRANK H. EASTERBROOK, *Chief Judge*

Hon. RICHARD A. POSNER, *Circuit Judge*

Hon. DIANE S. SYKES, *Circuit Judge*

No. 05-3722

NANCY SPIEGLA,
*Plaintiff-Appellee*,

*v.*

EDWARD HULL, Individually and as an Employee of Westville Correctional Facility, et al.,
*Defendants-Appellants*.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division at Lafayette.

No. 01 CV 0075

Allen Sharp,
*Judge*.

ORDER

On consideration of the petition for rehearing and for rehearing en banc, no judge in active service has requested a vote on the petition for rehearing en banc and all of the judges on the original panel have voted to deny rehearing. It is therefore ordered that the petition for rehearing and for rehearing en banc is DENIED.